

Employment Law Section

Family and Medical Leave Act Amended for Servicemembers

By *Stephanie Johnson Manning and Robyn M. Funk*

On Jan. 28, 2008, President Bush signed into law the National Defense Authorization Act of 2008,¹ which amended the Family and Medical Leave Act (FMLA)² of 1993 for the first time since its enactment. The amendments expand the FMLA to provide job protected leave to families of servicemembers of the U.S. Armed Forces. Prior to the amendments, the FMLA provided eligible employees³ up to 12 workweeks of unpaid job-protected leave during any 12-month period for: 1) the birth of a child of the employee and in order to care for such child; 2) the placement of a child with the employee for adoption or foster care; 3) the care of a spouse, son, daughter or parent who has a serious health condition; or 4) the employee's own serious health condition that makes the employee unable to perform the functions of his or her position.⁴ The amendments allow eligible employees leave in two new circumstances: 1) to address issues that arise due to a family member being called to active duty; and 2) to care for a family member who is injured in active duty.⁵

FAMILY LEAVE DUE TO A CALL TO ACTIVE DUTY

Under the first new category of leave, eligible employees are entitled to up to 12 workweeks of unpaid leave during any 12-month period because of "any qualifying exigency" relating to the fact that a spouse, son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a "contingency operation."⁶ The amendment defines a "contingency operation" as "a military operation...in which members of the armed forces are or may become involved in

military actions, operations, or hostilities against an enemy of the United States or against an opposing military force" or active duty during a war or national emergency.⁷

The term "qualifying exigency" is not defined by the amendment. The U.S. Department of Labor will issue regulations clarifying this phrase and has indicated that the provisions pertaining to family leave due to a call to active duty will not become effective until issuance of the regulations.⁸ In the meantime, the Department of Labor has encouraged employers to voluntarily provide this type of leave.⁹ Although "qualifying exigency" is yet undefined, it is expected that leave taken under this provision will presumably cover an employee's family member, for example, to arrange for child care or to settle financial matters. However, given the potential breadth of the term, the Department of Labor is being called to provide sufficient guidance to employers to avoid both confusion and abuse.¹⁰

When a call to active duty is foreseeable under this provision, employees are required to provide notice to the employer as is "reasonable and practicable."¹¹ As with most leaves under the FMLA, leave for a "qualifying exigency" may also be taken intermittently or on a reduced leave basis.¹² Furthermore, an employer can require that a request for leave related to active duty or a call to active duty be supported by a certification issued at such time and in such manner as the Department of Labor prescribes.¹³ However, the details regulating such certification are still to come. In the meantime, employers may want to implement a simple recordkeeping form that requests information such as the employee's relation-

ship to the servicemember, the dates for which leave is requested and a statement as to what qualifying exigency exists. Employers, however, may not require certification unless or until the Department of Labor issues regulations requiring such certification.

LEAVE FOR CAREGIVERS OF AN INJURED SERVICEMEMBER

The second new category of leave entitles an employee who is a spouse, son, daughter, parent or "next of kin" of a "covered servicemember" to take unpaid leave up to 26 workweeks in one 12-month period to care for an injured servicemember.¹⁴ A "covered servicemember" is defined as a member of the Armed Forces, including the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, in outpatient status or on the temporary disability retired list due to a serious injury or illness.¹⁵ A "serious injury or illness" is specifically defined for a member of the Armed Forces as an injury or illness incurred in the line of active duty that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating.¹⁶ Importantly, the servicemember caregiver provision broadens who may be considered a family member entitled to leave, allowing leave for "next of kin," which is defined as the nearest blood relative.¹⁷ For this new category of leave, an employee must provide at least 30 days notice to the employer, unless it is impractical to do so.¹⁸ Leave may also be taken intermittently or on a reduced leave basis.¹⁹

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The servicemember caregiver provision is effective immediately.²⁰ The Department of

Labor is expected to provide regulations which more fully explain this provision. In the meantime, employers are required to act in good faith in providing necessary leave and encouraged to apply current FMLA-type provisions to this new type of leave where appropriate.²¹ For example, an employer may choose to request the standard medical certification for leave taken under this provision until further guidance from the Department of Labor.²²

As with other leave types under the FMLA, employees taking leave under these new categories can elect, or employers can require an employee, to substitute unpaid FMLA leave with paid vacation leave, personal leave, family leave, or medical or sick leave.²³ Also the combined total leave for these two categories of leave, along with any other FMLA qualifying leave, may not exceed 26 workweeks during a 12-month period. That is, an employee may not combine caregiver leave of 26 weeks with a leave needed for the employee's own serious health condition to exceed the 26 week total. Unless specifically exempted, all other current FMLA requirements apply to these two new categories of leave, such as those requiring reinstatement to the previous position.

Attorneys who represent covered employers should make sure their clients are aware of the new leave entitlements and that their policies and postings are updated to reflect the changes to the law.

1. H.R. 4986.

2. 29 U.S.C. § 2601 *et. seq.*

3. Eligible employees under the FMLA are those individuals who have been employed by a covered employer for at least one year and have worked a minimum of 1,250 hours during the year. See 29 U.S.C. § 2611(2).

4. See 29 U.S.C. § 2612(a).

5. See 29 U.S.C. § 2612(a)(1)(E); 29 U.S.C. § 2612(a)(3).

6. 29 U.S.C. § 2612(a)(1)(E).

7. 29 U.S.C. § 2611(15) citing 10 U.S.C. § 101(a)(13).

8. The Department of Labor's Wage and Hour Division published a Notice of Proposed Rulemaking under the FMLA. Comments were required to be submitted by April 11, 2008. See www.dol.gov/esa/whd/fmla/; see also www.dol.gov/esa/whd/fmla/NDAA_fmla.htm (last accessed on April 28, 2008).

9. See *Id.*

10. *President Signs Bill Expanding FMLA Leave for Military Families*, 15 FAMILY AND MEDICAL LEAVE HANDBOOK 1, 8 (Peter Susser et al. eds., 2008).

11. 29 U.S.C. § 2612(e)(3).

12. See 29 U.S.C. § 2612(b)(1).

13. See 29 U.S.C. § 2613(f).

14. 29 U.S.C. § 2612(a)(3).

15. 29 U.S.C. § 2611(16).

16. 29 U.S.C. § 2611(19).

17. See 29 U.S.C. § 2611(18).

18. See 29 U.S.C. § 2612(e)(2).

19. See 29 U.S.C. § 2612(b)(1).

20. See www.dol.gov/esa/whd/fmla/NDAA_fmla.htm (last accessed on April 28, 2008).

21. See *Id.*

22. *President Signs Bill Expanding FMLA Leave for Military Families*, 15 Family and Medical Leave Handbook 1, 9 (Peter Susser et al. eds., 2008).

23. 29 U.S.C. § 2612(d)(2)(A) & (B).

Authors' Note: The authors would like to thank Shannon Dodd for her assistance in preparing this article. Ms. Dodd was a third-year student at the University of Tulsa College of Law. Ms. Dodd joined Titus Hillis Reynolds Love Dickman & McCalmon in May 2008.

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